UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RODNEY BARBER, Plaintiff,	:	
vs.	:	C.A. NO.: 05-390-ML
VERIZON NEW ENGLAND INC., Defendant.	:	

DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Defendant Verizon New England Inc. ("Verizon"), by and through its undersigned attorneys, submits this Statement of Undisputed Facts ("Defendant's Statement") pursuant to LR Cv 56. Where Verizon states what Plaintiff has alleged, Verizon presents those allegations as undisputed because it will assume them to be true, but legally insufficient, for the purposes of its Motion for Summary Judgment. Verizon does not concede Plaintiff's allegations on the merits.

A. PLAINTIFF'S HEPATITIS

1. Mr. Barber was first diagnosed with Hepatitis C some time between 1994 and 1997. [Complaint, ¶ 9; Deposition of Rodney Barber ("Barber Depo."), at 59:18 to 60:1.][1]

2. Mr. Barber had no symptoms when he was first diagnosed with hepatitis. Rather, he learned that he had hepatitis from a blood test that was performed for other reasons. [Barber Depo., at 60:6-14; 69:25 to 70:6.]

3. Mr. Barber experienced no symptoms from his hepatitis until two or three months before his deposition, which took place on May 10, 2006. Therefore, Mr. Barber was not symptomatic until, at the earliest, February 2006. [Barber Depo., at 70:11-22; 73:13-15.]

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[1] Referenced portions of the Barber Deposition are attached hereto as Exhibit A.

4. The only symptoms Mr. Barber identified in his interrogatory answers are fatigue and interference with his sleep-wake cycle. [Plaintiff's Answers to Defendant's Interrogatories, No. 12.][2]

5. Mr. Barber's trouble sleeping began in February or March 2006. He had no trouble sleeping before that time. [Barber Depo., at 71:21 to 72:2.]

6. Mr. Barber has trouble falling asleep two to four times per month, and frequently wakes up in the middle of the night and is unable to go back to sleep for an hour or two. [Barber Depo., at 70:23 to 72:10.]

7. Starting in February or March 2006, Mr. Barber has felt "a little bit extra" fatigued during the day or in the evening, although he recognizes that "[w]e all get fatigued" sometimes. [Barber Depo., at 72:11 to 73:15.]

8. Mr. Barber experiences nausea "[a] couple of times a month," but he does not know whether the nausea is related to his hepatitis and cannot remember whether a doctor ever told him it is. [Barber Depo., at 63:5 to 64:3.]

9. As a result of his hepatitis, Mr. Barber has modified his diet to avoid fried, fatty, and spicy foods; in other words, "[a]ll the good stuff that I should not have been eating anyway." [Barber Depo., at 74:11 to 75:11.]

10. Mr. Barber has made no changes to his lifestyle other than avoiding fried, fatty, and spicy foods. [Barber Depo., at 75:12-14.]

11. Other than fatigue, problems with his sleep-wake cycle, avoiding fried, fatty, and spicy foods, and worrying about his health, the hepatitis has had no affect on Mr. Barber's life. [Barber Depo., at 75:19 to 76:6.]

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[2] Mr. Barber's answers to interrogatories are attached hereto as Exhibit B.

12. Mr. Barber claims that the frequency with which he had sexual intercourse with his wife dropped from once every two days to a few times per year, beginning in 2001 or 2002. Mr. Barber believes that his hepatitis is related to the decline in his sexual activity, "[p]robably through the depression," but no doctor has told him so, nor has he asked. [Barber Depo., at 141:4 to 145:17.][3]

13. Mr. Barber claims that the hepatitis interfered with he and his wife starting a family while he was receiving treatment because his doctors (whom he does not identify) "did not know what the medicine would do," and because he was told (again, by a person or people he does not identify) "that there is a 1 to 2 percent chance" of passing hepatitis on to a child. [Barber Depo., at 140:1 to 141:3.]

14. Mr. Barber thinks that the fatigue allegedly caused by his hepatitis has affected his mental abilities, but no one has ever told him that is the case. His alleged loss of mental acuity has had no impact on his work. [Barber Depo., at 153:4 to 154:6.]

15. The hepatitis has had no effect on Mr. Barber's work. [Barber Depo., at 75:15-18.]

16. Mr. Barber does not recall asking Verizon for any accommodation or allowance for his hepatitis prior to his termination. [Barber Depo., at 131:15 to 132:15.]

B. VERIZON'S DISABILITY POLICY AND CODE OF BUSINESS CONDUCT

17. Verizon's disability benefit plan provides, among other things, that an employee on disability leave "[m]ust obtain permission from the claims administrator if you plan to

[3] Mr. Barber will be unable to present any medical testimony concerning his alleged sexual difficulties. Pursuant to Magistrate Judge Martin's September 25, 2006 Order, Mr. Barber may not present any affidavit from an expert witness "to the extent that such affidavit (or other form of evidence) contains factual information or opinion which is not explicitly and fully stated in the 'Disclosures of the Plaintiff as Per the Pretrial Order.'" On the issue of alleged sexual limitations, Mr. Barber's Disclosures merely state that "Dr. Emgushov would testify as to the effect Mr. Barber's diagnosis has on … sexual functioning." There is neither the slightest indication of what that alleged effect is, nor if, how, or why Dr. Emgushov concluded that Mr. Barber was substantially limited in his sexual functioning.

recuperate away from home at any time during your absence." [Verizon Disability Benefit Plan ("Benefit Plan"), at 8.][4]

18. The Benefit Plan also contains a section entitled, "Permission to Leave Home," which states: "If you are receiving … benefits and wish to travel, you must [o]btain approval for the specified time of your absence from your case manager … [and] [s]ubmit to the administrator satisfactory proof of your disability while absent. Otherwise, benefits will not be paid for your period of absence." [Benefit Plan, at 21.]

19. Verizon's Code of Business Conduct, under the section on "Company Benefits," provides: "Verizon's benefits plans and programs (including, but not limited to, insurance, pension and retirement, and medical plans) are provided to us as compensation and we must use these benefits honestly…. We will provide complete and accurate information about covered members and ourselves as required for employee-related benefits plans. We will not misrepresent our health status or other reasons for absence (for example, misrepresenting one's health condition or receiving disability benefits while working on another job)." [Code of Business Conduct, at 27.][5]

20. Mr. Barber was familiar with the Code of Business Conduct. [Barber Depo., at 122:17-19.]

C. PLAINTIFF'S EMPLOYMENT AT VERIZON

21. Mr. Barber began working for Verizon in 1985, has been employed continuously at Verizon except for approximately a nine-month period in 2004, and remains employed there today. [Barber Depo., at 26:1-11.]

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[4] Referenced portions of the Benefit Plan are attached hereto as Exhibit C.

[5] Referenced portions of the Code of Business Conduct are attached hereto as Exhibit D.

22. Mr. Barber worked as an installer from 1985 to 2000, at which point Mr. Barber became a Central Office Equipment Installer. [Barber Depo., at 26:16 to 27:2; 29:2-5; 33:7-15.]

23. Throughout his employment at Verizon, Mr. Barber has been a member of the International Brotherhood of Electrical Workers (the "Union"). [Barber Depo., at 27:19 to 28:3.]

24. At the time of Mr. Barber's termination in 2004, he understood Sharon Mello ("Ms. Mello") to be his immediate supervisor, known as a "first-level manager"; he understood that David Paolino was his first-level manager when Mr. Barber was reinstated from his termination in 2005. [Barber Depo., at 38:1-8; 95:7-10.]

25. Mr. Barber was friendly with Ms. Mello. [Barber Depo., at 97:1-2.]

26. Mr. Barber's second-level manager (his immediate supervisor's boss) was Joseph Conway ("Mr. Conway"). [Barber Depo., at 37:20-21; 38:1-4.]

27. Mr. Barber's third-level manager (his second-level manager's boss) was Lorna Deplitch ("Ms. Deplitch"). [Barber Depo., at 37:22-23; 38:1-4.]

28. Mr. Barber interacted almost daily with his first-level managers. [Barber Depo., at 39:5-8.]

29. Mr. Barber almost never interacted with Mr. Conway. In fact, Mr. Barber had never even met Mr. Conway before his termination in 2004. [Barber Depo., at 39:11-15.]

30. The first time Mr. Barber met Ms. Deplitch was at the arbitration hearing following his termination, and he has seen her only once since then. [Barber Depo., at 39:25 to 40:8.]

D. PLAINTIFF'S LEAVE OF ABSENCE, HIS TRIP TO LAS VEGAS AND HIS TERMINATION

31. In connection with his hepatitis treatments, Mr. Barber was approved for and took a paid disability leave from Verizon from October 26, 2003, through January 16, 2004. [Complaint, ¶ 10; Barber Depo., at 90:3 to 91:16.]

32. At the time, MetLife administered Verizon's disability benefit plan. [Complaint, ¶ 10.]

33. Between January 1 and January 5, 2004, Mr. Barber attended a wedding in Las Vegas. [Complaint, ¶ 11; Barber Depo., at 120:14 to 121:3.]

34. Mr. Barber neither asked for nor received permission from MetLife to travel to Las Vegas while on his disability leave. [Testimony of Rodney Barber at November 18, 2004, Arbitration Hearing ("Barber Arb. Test."), at 335:22 to 336:9.][6]

35. Mr. Barber returned to work at Verizon on January 16, 2004. [Complaint, ¶ 13.]

36. Shortly after Mr. Barber returned to work, Mr. Conway learned that Mr. Barber had traveled to Las Vegas, as several Verizon employees had attended the wedding as well, and saw Mr. Barber there. [Testimony of Joseph Conway at October 25, 2004, Arbitration Hearing ("Conway Arb. Test."), at 33:18 to 35:13.][7]

37. After conferring with MetLife, Mr. Conway determined that Mr. Barber had not received permission from MetLife to travel to Las Vegas while on disability leave. [Conway Arb. Test., at 53:1-6; 57:6 to 58:1; 61:14 to 62:8.]

38. Mr. Conway then informed Lorna Deplitch that Mr. Barber had traveled to Las Vegas without permission while on disability leave. [Conway Arb. Test., at 65:5 to 66:3;

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[6] Referenced portions of Mr. Barber's arbitration testimony are attached hereto as Exhibit E.

[7] Referenced portions of Mr. Conway's arbitration testimony are attached hereto as Exhibit F.

Testimony of Lorna Deplitch at October 25, 2004, Arbitration Hearing ("Deplitch Arb. Test."), at 111:20 to 112:13.][8]

39. Employees on disability leave are not permitted to travel without the permission of MetLife. [Conway Arb. Test., at 51:13-22; Deplitch Arb. Test., at 112:14-21; Benefit Plan, at 8, 21.]

40. Traveling without permission while on disability leave is a violation of the Code of Business Conduct, because it constitutes a dishonest use of benefits. [Conway Arb. Test., at 64:10-14; Deplitch Arb. Test., at 116:22 to 118:5; Code of Business Conduct, at 27.]

41. Traveling without permission while on disability leave is a terminable offense. [Deplitch Arb. Test., at 125:9-12.]

42. Ms. Deplitch made the decision to terminate Mr. Barber's employment. [Deplitch Arb. Test., at 128:19-24.]

43. Ms. Deplitch based her decision to terminate Mr. Barber's employment solely on his traveling to Las Vegas without permission while on disability leave, which was a violation of Verizon's Code of Business Conduct. [Deplitch Arb. Test., at 136:18 to 137:21.]

44. By letter dated January 29, 2004, Verizon informed Mr. Barber that he was being terminated effective January 16, 2004, for violating Verizon's Code of Business Conduct by traveling to Las Vegas without permission while on disability leave. [Complaint, ¶ 16; January 29, 2004, Letter from Verizon to Barber ("Termination Letter"); Deplitch Arb. Test., at 128:5-10.][9]

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[8] Referenced portions of Ms. Deplitch's arbitration testimony are attached hereto as Exhibit G.
[9] A copy of the Termination Letter is attached hereto as Exhibit H.

E. PLAINTIFF'S ARBITRATION AND REINSTATEMENT WITHOUT BACK PAY

45. Mr. Barber grieved his termination, and eventually the matter went to an arbitration between Verizon and the Union before a panel of the American Arbitration Association. Hearings in the arbitration were held on October 25 and November 18, 2004. The question before the arbitrator was whether Verizon had "just cause" to terminate Mr. Barber within the meaning of the Collective Bargaining Agreement, and if not, what the appropriate remedy would be. [Arbitrators' Decision, at 1, 2.][10]

46. The panel eventually concluded that termination was too harsh a punishment and ordered Mr. Barber reinstated. However, the panel also concluded that Mr. Barber had, in fact, knowingly and intentionally violated the requirement that he obtain permission from MetLife before traveling to Las Vegas:

> The Panel is convinced that Mr. Barber knew he should have contacted MetLife for permission before traveling to Las Vegas. Maybe he put off getting permission because, as he testified, he did not know up until the last minute whether he would feel well enough to go. On the other hand, maybe he felt close enough to the end of his already-approved disability period that he was willing to roll the dice and take his chances….
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> … [T]he panel views his decision to go to Las Vegas as particularly and uniquely flagrant. Mr. Barber has a serious illness. His Company and the Company's claims administrator took his illness seriously and compensated him while he attempted recovery. Mr. Barber's period on disability was lengthy, and no doubt costly to the Company. For him, at the end of that combined lengthy period, to fly to Las Vegas of all places, is such an "in your face" act that it warrants a serious disciplinary response. It would be difficult to create a scenario which would be more corrosive to how other employees view the necessity to follow Plan requirements than was Mr. Barber's decision at the end of a long period of coverage to go to Las Vegas….

[Arbitrators' Decision, at 43-44.]

47. As a result of its conclusion that Mr. Barber had knowingly and flagrantly violated the requirements of Verizon's disability plan, the panel ordered Mr. Barber's

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[10] Referenced portions of the Arbitrators' Decision are attached hereto as Exhibit I.

reinstatement to be without pay and allowed Verizon to "place an appropriate suspension letter in his file." [Arbitrators' Decision, at 44.]

F. LACK OF EVIDENCE OF DISCRIMINATION

48. Sandra Hurt, another Verizon employee who attended the same wedding in Las Vegas while she was on disability leave, also was terminated. [Conway Arb. Test., at 44:5-14; 50:13; Deplitch Arb. Test., at 125:13-22.]

49. Mr. Barber's only basis for claiming discrimination against Verizon is his belief that "[o]ther co workers [sic] in the same situation were only suspended not terminated from their position but I was. In addition, termination was too great a punishment for my alleged actions." [Plaintiff's Answers to Defendant's Interrogatories, Nos. 14, 15.]

50. However, Mr. Barber does not know the names of these alleged co-workers, does not know whether they were on disability leaves or simply out sick for a few days, and he received all of his alleged information second-hand from the president of the Union. [Barber Depo., at 126:6 to 130:8.]

51. Mr. Barber speculates that Verizon wanted to get rid of him because he was a "nonproductive employee," but the only statement anyone at Verizon ever made to him with respect to being "nonproductive" was being told that when he took half-days off (as opposed to disability leave), that would be coded as "nonproductive time," which is the designation Verizon gives to personal time off. His disability leaves were not coded as "nonproductive time." [Barber Depo., at 113:17 to 116:12.]

52. No one at Verizon told Mr. Barber that he was a nonproductive employee, or that they wanted to get rid of him for that reason. [Barber Depo., at 115:11 to 116:9; 123:14-21; 124:3-6.]

53. No one at Verizon told Mr. Barber they felt he was a liability to the company. [Barber Depo., at 133:5-7.]

54. Mr. Barber's sole basis for concluding that Verizon viewed him as a liability is other employees' statements to him that they thought he should not have been terminated and believed Verizon terminated him because he was sick. [Barber Depo., at 133:8 to 137:21.][11]

55. The sole basis for Mr. Barber's claim that Joseph Conway discriminated against him is his belief that Mr. Conway could have chosen a punishment less severe than termination but did not. Mr. Barber claims that *after* he returned following his reinstatement by the arbitrator, Mr. Conway tried to make him work night shifts, but he admits that he got a note from his doctor advising him not to work night shifts, he did not work night shifts, and Mr. Conway took no further action. [Barber Depo., at 117:10 to 120:13.]

56. The sole basis for Mr. Barber's claim that Lorna Deplitch discriminated against him is his belief that she "saw the opportunity" to get rid of him, but he admits that he "can't guess what's in her head." [Barber Depo., at 124:21 to 125:1.]

57. The sole basis for Mr. Barber's claim that Sharon Mello discriminated against him is his belief that she was "following the consensus" from Mr. Conway and Ms. Deplitch; in essence, that she did not try to stop him from being terminated. [Barber Depo., at 116:19 to 117:5.]

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[11] These statements from other employees are irrelevant and constitute inadmissible hearsay. Verizon points them out simply to illustrate that Mr. Barber's discrimination claim is built solely on speculation and lacks any evidentiary foundation.

VERIZON NEW ENGLAND INC.,
By its attorneys,

/s/ Raymond M. Ripple

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 2nd day of October, 2006, I caused a copy of the foregoing to be served by first-class mail on:

Bruce P. Gladstein, Esq.
750 East Avenue
Pawtucket, RI 02860

/s/ Raymond M. Ripple
Raymond M. Ripple (#6489)

LIST OF EXHIBITS

A	Barber Deposition Excerpts
B	Plaintiff’s Answers to Defendant’s Interrogatories
C	Disability Benefits Plan Excerpts
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